United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20 092

MAURICE C. STEVENSON

Appellant

v.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTION PRESENTED

Whether convictions of housebreaking and robbery, based solely on the testimony of an expert concerning a fingerprint of appellant's found on a container, can be sustained where there was no showing that the print was placed on the container on the date of the crime, nor any showing that when the print was placed on the container the latter was located on the premises where the crime allegedly occurred?

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INDEX

TABLE OF CITATIONS

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* Cases principally relied upon.

JURISDICTIONAL STATEMENT

Appellant was arrested on July 3, 1965, and subsequently charged in a three-count indictment with having committed the offenses of housebreaking, robbery and grand larceny. The case came on for trial on January 3, 1966, and on January 6, 1966, the jury returned a verdict of "Guilty" as to the housebreaking and robbery and "Not Guilty" as to the grand larceny. On February 18, 1966, appellant was sentenced to a concurrent term of imprisonment for two to six years. On February 25, 1966, appellant applied for leave to appeal in forma pauperis. Leave was granted on that same day. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291, and Rule 37, Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

In Criminal Action No. 943-65, Maurice C. Stevenson, together with one Ernest Borum, was charged in a three-count indictment with having committed the offenses of housebreaking, robbery and grand larceny on or about July 2, 1965. According to the Government's theory of the case, all of the offenses occurred during one transaction, to wit: a breaking into of premises 2714 O Street, Southeast, by the defendants about 10:00 A.M. on July 2, 1965, a robbery by force committed upon one Effie Thomas while therein, and a stealing of property of Roy Davis, of a value of about $1345, during a looting of the

premises. The case came on for joint trial on January 3, 1966, and on January 6, 1966, the jury returned a verdict of "Guilty" as to each defendant on the counts charging housebreaking and robbery, and "Not Guilty" as to each defendant on the count charging grand larceny (Tr. 434-435). Motions for judgment of acquittal, made on behalf of the defendant Stevenson at the close of the Government's case (Tr. 169-170), at the close of all the evidence (Tr. 280) and after the return of the verdict (see written motion filed January 11, 1966) were denied. On February 18, 1966, Stevenson was sentenced to concurrent prison terms of two to six years on count one (housebreaking) and count two (robbery). It is from this verdict and judgment that appellant appeals.

Due to the nature of the question presented on this appeal, it is deemed advisable to set forth in some detail the testimony of the four Government witnesses:

James F. Nenno: A metropolitan police fingerprint expert, Nenno testified that at about 10:30 A.M. on July 2, 1965, he went to premises 2714 O Street, Southeast, and lifted latent fingerprints from some objects located therein (Tr. 93). One such print, lifted from the bottom of a metal candy tin in the first-floor rear bedroom (Tr. 99, 162), was compared with known fingerprints of appellant taken after his arrest at about 10:15 P.M. on July 3, 1965. Nenno then testified that the known left thumb print, taken from Stevenson after his arrest, and the latent left thumb print lifted from the metal container were identical and, in his opinion, belonged to the same person (Tr. 99, 132).

On cross-examination, Pvt. Nenno admitted that he did not know when the latent fingerprint was put on the container (Tr. 162) and conceded that tests conducted by the Federal Bureau of Investigation have established that, under ideal conditions, fingerprints may last on an object up to two years (Tr. 168-169).

Roy R. Davis: Mr. Davis, the owner of the premises in question, testified that about 10:00 A.M. on July 2, 1965, he received a telephone call on his job advising him that his home had been robbed; that he rushed home and discovered the screen door cut, the glass panel in the door smashed, his home in complete disorder, and a large amount of money and some jewelry missing (Tr. 16-20)*. With reference to the metal candy tin on which Stevenson's print was found, Davis testified that the container belonged to his mother-in-law, having been given to her by her son about three years prior to the date of the crime, that the mother-in-law kept the container in her back bedroom, and that said container never left his home during the three years his mother-in-law has owned it (Tr. 22-23).

On cross-examination, Davis couldn't recall ever "going into" the candy tin himself (Tr. 65) and stated, "I cannot answer that", in response to a question concerning the position of the lid on the container on the night prior to July 2, 1965, because "this container was kept in the room that the mother-in-law occupied, this is where this was found" (Tr. 66).

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*(Note: None of the money or items allegedly taken was introduced into evidence.)

Effie Thomas: Mrs. Thomas, the mother-in-law, is eighty-one years of age, has cataracts in her eyes, and "can't see hardly any, everything is a heavy fog" (Tr. 75). She testified that on July 2, 1965, while she was alone in the premises in question, two men busted the front door open, entered, ransacked the house - taking money from various places - took $23.25 from her pocket, tied her up and departed (Tr. 74-79). With reference to the candy container on which Stevenson's fingerprint was found, she testified that she had owned it about three years and that it was kept in her bedroom (Tr. 80). Government counsel did not ask her, the owner of the container, (as he did Roy Davis) whether or not it had ever been taken from the premises, nor did he ask her to even attempt to make a courtroom identification of the defendants.

Linda Mathis: This thirteen-year-old neighbor of the Davis', testified that on July 2, 1965 at about 10:00 A.M., while standing in her yard, she observed two shabbily-dressed colored men (who passed by within 10 to 15 feet of where she was standing) walk up to Mr. Davis' stairway, knock on his screen door and pull it a little, and then disappear around by the side gate. She couldn't remember the color of the clothing the men were wearing (Tr. 88). She stated that the taller of the two men "looked like" the defendant Stevenson, but she "couldn't be sure" (Tr. 85-86).

In his defense, the defendant Stevenson called the following four witnesses: Lizzie Mae Stevenson, his wife (Tr. 172-195); Shirley Ricks, his sister-in-law (Tr. 195-204); Gerald Ricks, his brother-in-law (Tr. 206-216-A) and Ida Borum, his mother-in-law (Tr. 238-246). Their testimony may briefly

be summarized as follows: that Mrs. Ida Borum was injured in an automobile accident about 3:00 A.M. on July 2, 1965, and taken to Casualty Hospital, where she remained about two hours, and was told to report back to the clinic not later than 11:00 A.M.; that Maurice Stevenson was at his home located at 2763 Langston Place, S.E. during the early morning hours of July 2, 1965, and left his home, accompanied by his wife and four children and the Rick's and their child, about 10:00 A.M. to go pick up Mrs. Borum, who lived at 416-11th Street, S.E. and take her to Casualty Hospital for her clinic appointment; that they arrived at the Borum household shortly after 10:00 A.M., left the children there, picked up Mrs. Borum, and proceeded to Casualty Hospital, arriving there about 11:00 A.M. that morning.

RULE INVOLVED

Rule 29, Fed. Rules of Criminal Procedure:

> (a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

STATEMENT OF POINT

In this case involving, inter alia, the crimes of housebreaking and robbery, the Court's denial of motion for judgment of acquittal was error where the sum total of the following circumstances existed: (a) There was no introduction into evidence of the fruits of the crime, (b) there was no eye-witness testimony identifying the appellant as a participant in the crime, and (c) there was no showing that the latent fingerprint, lifted from a metal container and identified as appellant's, was placed thereon on the date of, and at the scene of the crime.

SUMMARY OF ARGUMENT

Reasonable jurors, relying solely on the fact that a latent fingerprint of appellant was found on a metal container located in a particular house, could not conclude beyond a reasonable doubt that appellant broke into said house and forcefully robbed an occupant thereof on or about July 2, 1965, when (a) the Government fingerprint expert who lifted the print admitted that he had no idea how long it had been on the container, and (b) there was no testimony from the owner of the container that it had at all times prior to July 2, 1965, remained on the premises.

ARGUMENT

With respect to this Argument, appellant desires the Court to read the following pages of the reporter's transcript: Volume 1 - Tr. 16-23, 65-66, 74-80, 85-88, 93-94, 98-100, 132, 162, 168-171. Volume 2 - Tr. 250, 280. Volume 3 - Tr. 347-349, 354-355, 361, 393-395, 397, 405, 407-410, 412, 415-416, 418-419, 438.

This Court should reverse the judgment of the lower Court in this case because appellant's motion for judgment of acquittal should have been granted.

In Curley v. United States, 81 U.S. App. D.C. 389, 392, 160 F. 2d 229, 232, cert. denied 331 U.S. 837 (1947), this Court enunciated the standard to be followed upon the consideration of such a motion in these words:

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion.....

That such a doubt must necessarily have existed in a reasonable mind upon the evidence in this case is an inescapable conclusion.

Appellant, arrested at his home on July 3, 1965, was subsequently indicted, along with his brother-in-law, Ernest Borum, on charges of housebreaking, robbery and grand larceny. According to the indictment, the alleged offenses occurred within the District of Columbia on or about July 2, 1965. And according to the prosecutor's opening statement at trial all of the alleged offenses resulted from one transaction, which occurred about 10:00 o'clock on the morning of July 2, 1965, at premises 2714 O Street, Southeast. Upon the testimony adduced by the Government in its case in chief, there is little doubt but that two persons did break into premises 2714 O Street, Southeast, on July 2, 1965, and did therein forcefully rob the witness Effie Thomas. But this same evidence cast upon the jury a burden unallowed by our American system of jurisprudence. It required the jury to surmise and speculate in order to conclude that appellant was one of the participants. It is comforting to appellant to know that only two weeks ago this Court - in Hiet v. United States, No. 19716, decided June 22, 1966 - reaffirmed its position that such a result cannot be allowed to stand.

The facts in Hiet are remarkably similar to those in the instant case. There, the complainant reported that he had left his car parked on D Street for about thirty minutes on the evening of November 24, 1964, and returned to find the right-front vent window jimmied open and some valuables missing from the car. The police found fingerprints on the inside of the opened vent window. Reviewing the Government's case, the Court stated (Slip Opinion, p. 2):

> The only evidence against Hiet in this case was the fingerprint taken from the car window, identified as his. He was not placed in the vicinity of the car on the evening in question, or in that immediate neighborhood at any other time. He was not shown to have been in possession of any of the stolen property at any time. None of it was ever recovered, so far as this record shows. There was no testimony as to the probable age of the print when taken, although the Government's theory was it was not more than an hour old when the expert lifted it. Evidence showed that Hiet had been livin g and working in the City four or five days prior to the date in question. The print may have been put on the window on any of those days or nights.
>
> .....Hiet, wandering about the street or simply passing by, at a time other than the thirty-minute period critical in this case, may have pushed on the unlocked vent; perhaps he did so for no good purpose.

In reversing Hiet's conviction of grand larceny, the Court concluded, in language equally applicable to the instant case (Slip Opinion, p. 3):

> Unquestionably the print raises a suspicion. But a suspicion, even a strong one, is not enough. Guilt must be established beyond a reasonable doubt, and each and every element of the offense charged must be established beyond a reasonable doubt..... Obviously one element of the crime (larceny) is that the accused took the property; not that he was at some time in the vicinity of the property but that he took it and carried it away.

In the instant case, as in Hiet, "there was no testimony as to the probable age of the print when taken". Indeed, in this case Pvt. Nenno (the same expert who testified in Hiet) admitted not only that he did not know when appellant's fingerprint was placed on the container where it was found, but also that, under ideal

ideal circumstances, such a print could last for two years.[1] Further, like the defendant Hiet, appellant herein "was not shown to have been in possession of any of the stolen property at any time". Finally, like the defendant Hiet, appellant herein "was not placed in the vicinity of the (crime) on the (morning) in question, or in that immediate neighborhood at any other time". Effie Thomas, the nearly-blind eighty-one year old robbery victim, wasn't even asked to attempt to make a courtroom identification of the men who robbed her. The only witness called by the Government to establish appellant's presence in the vicinity of the house wherein the crimes occurred on the day in question was

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1/ Notwithstanding this testimony by his own expert witness, Government counsel, in his closing argument to the jury, at one point inferred - and at another point categorically stated - that the print could only have been placed on the container on July 2, 1965, during the course of the housebreaking and robbery.

> But what other opportunity was there for these defendants to put their prints on these objects? What other opportunity was there for anyone, other than from the immediate household, except during of course that housebreaking and robbery on July 2nd? (Tr. 354).
>
> [W]e have got the scientific proof, the fingerprints, inside the house, that could not have gotten in there any other time except the time of the housebreaking at 10 o'clock (Tr. 361).

Thus, closing argument produced the only "evidence" that appellant's fingerprint was placed inside the premises in question on July 2, 1965.

Linda Mathis, the thirteen-year old neighbor. That she failed to do so was abundantly clear even to Government counsel. 2/

Thus, in this case, as in Hiet, the conviction resulted solely from fingerprint evidence. But that evidence in the instant case has an additional defect not present in Hiet. There, the print was found on the inside of the automobile vent window, a fixed object. --a circumstance which led Senior Circuit Judge Prettyman to comment (Slip Opinion, pp. 2-3):

> Hiet, wandering about the street or simply passing by, at a time other than the thirty-minute period critical in this case, may have pushed on the unlocked vent; perhaps he did so for no good purpose. (emphasis added)

Whereas, in the instant case, the print was found on a small movable metal container, the owner of which was never asked by the Government during trial

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2/ In reviewing her testimony with the jury upon closing argument, he stated (Tr. 349):

> Now, in the courtroom she thought she recognized--she didn't even go that far, she said that Mr. Stevenson looked like one of the men but she couldn't be sure, looked like the taller man. Well, it is obvious, if you have watched the defendants, Mr. Stevenson is the shorter man here. I wouldn't ask you to convict Hitler on that eyewitness testimony, certainly not.

I confess my inability to improve upon this admirably candid analysis by the Government of the testimony of Linda Mathis.

to state that it had always remained on the premises.[3/] Thus, if the defect in the Government's case relating to time alone was deemed sufficient to warrant reversal of the conviction in Hiet, a fortiori, the defect in the Government's evidence in the instant case relating both to time and place should be sufficient to warrant reversal of appellant's conviction.

The issue presented on appeal in Hiet, to wit, sufficiency of the evidence in a fingerprint case, was not one of first impression. And the holding therein merely once again demonstrated this Court's continued concern throughout the years that a man not be deprived of liberty on scanty evidence.

In 1954, this Court decided Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39. In that case, Cooper was indicted, tried and convicted jointly with one Bullard for robbery. The complainant and her husband positively identified Bullard as one of the robbers. They also pursued the getaway car and identified its tag number. The car was registered in Bullard's name, but all witnesses agreed that Cooper was actually purchasing it. Both Cooper and Bullard drove it upon occasion. It was shown at trial that Cooper went to a cousin and, telling her he was in trouble, asked her to tell all inquirers that she was with him in Warsaw, North Carolina, on the day of the robbery. The cousin was not in fact in Warsaw that day. A fingerprint expert testified that a print, found on the wheel of the getaway car and identified as Cooper's, could,

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3/ Roy Davis did testify that the container never left the premises during the three years his mother-in-law had owned it, but he "could not answer" any other questions concerning the container because it "was kept in the room that the mother-in-law occupied" (Tr. 66). It is apparent, therefore, that his assertion that the container never left the premises was merely an assumption on his part, not based on personal knowledge.

if it were undisturbed, have been there for an indefinitely long period. Nobody identified Cooper as one of the robbers, or placed him at the scene thereof.

This Court unanimously reversed Cooper's conviction flowing from the circumstances outlined above. Judge Prettyman succinctly stated the Court's rationale as follows (94 U.S. App. D.C. at 345-346, 218 F.2d at 41-42):

> It is clear to us that upon the evidence in the case at bar a reasonable mind must necessarily have had a reasonable doubt as to Cooper's guilt.... That the getaway car was being bought by Cooper, that he was a friend of Bullard, who was clearly one of the robbers according to this record, and that he asked his cousin to corroborate his being in North Carolina, create suspicion. Such evidence might raise a question in a reasonable man's mind. But that is not enough. Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And, unless that result is possible on the evidence, the judge must not let the jury act; he must not let it act on what would necessarily be only surmise and conjecture, without evidence.

Suffice it to say, in the instant case the jury was allowed to act on evidence creating less suspicion than that present in Cooper.

In 1963, this Court decided Campbell v. United States, 115 U.S. App. D.C. 30, 316 F.2d 681. In that case, Campbell and a co-defendant, one Simms, indicted for robbery, were convicted of the lesser included offense of grand larceny. No witness testified that Campbell, or anyone resembling him, was at the scene of the crime. As in Cooper, his fingerprint was found on the steering wheel of the robbery car. The expert admitted, however, that the print could have been there for several weeks prior to the time he discovered it. The Government relied upon evidence indicating that Campbell was with

Simms shortly after the robbery had occurred, and evidence showing that Campbell's keys were found in Simms' room by the police.

In reversing Campbell's conviction with instructions to enter a judgment of acquittal, this Court - Judge Wright speaking for the majority - stated (115 U.S. App. D.C. at 32, 316 F.2d at 683):

> At best, this evidence simply shows that Simms and Campbell were friends, that on occasion Campbell drove Simms' automobile, and that Campbell was seen with Simms near Simms' home shortly after the crime, but was not the other suspicious person loitering at the supermarket with Simms shortly before the crime. In our judgment, this is not the kind of evidence which, under our law, can deprive a man of his liberty. The close association of Simms and Campbell, together with the testimony that they were seen together shortly after the crime, certainly gives rise to a suspicion that Campbell was indeed the unidentified participant with Simms in the robbery.

But, again, this Court held that suspicion is not enough.

Also in 1963, this Court decided Cephus v. United States, 117 U.S. App. D. C. 15, 324 F.2d 893, unanimously reversing--due to insufficient evidence--a conviction of unauthorized use of a motor vehicle. Chief Judge Bazelon, commenting upon the deficient evidence, stated (117 U.S. App. D.C. at 17, 324 F. 2d at 895):

> The Government's witnesses testified that a car was reported missing from a dealer's service garage on June 13, 1962, that the co-defendant was arrested while driving the vehicle that night, that one of several fingerprints found on the outside of the left ventilation window was appellant's, that appellant after his arrest denied any knowledge of the automobile, and that he

> claimed not to have seen co-defendant since before the date of the alleged unauthorized use. Based upon that evidence alone, the jury could not have found beyond a reasonable doubt that appellant was guilty.

In the instant case, the Court correctly instructed the jury that, before they could return a verdict of guilty, they must be satisfied beyond a reasonable doubt that the housebreaking (Tr. 408) and robbery (Tr. 412) occurred on or about July 2, 1965. There was absolutely no evidence connecting appellant with the robbery. And, since the only evidence connecting him with the housebreaking was a latent fingerprint that could have been placed on the container where it was discovered at a different time, and a different location, than that of the alleged crime, there was insufficient evidence to go to the jury on this count as well.

Appellant submits that Cooper, Campbell and Cephus, the precedent for this Court's decision in Hiet v. United States, supra, should - together with Hiet - afford ample precedent for granting the relief sought herein.

CONCLUSION

WHEREFORE, Appellant respectfully submits that the judgment of the lower Court be reversed and the case remanded with instructions to enter judgment of acquittal as to appellant on both the housebreaking count, and the robbery count, of the indictment.

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(1)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,092

MAURICE C. STEVENSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,093

ERNEST S. BORUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
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Cr. No. 943-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Does 18 U.S.C. § 5021(a), in providing for the setting aside, under certain conditions, of a "conviction" of a youth offender, require that the offender's fingerprints be expunged from police files?

2) Did the trial court properly deny appellants' motions for judgments of acquittal at the close of the Government's case, where the Government's evidence showed that (1) fingerprints of both appellants were found on objects which had been handled by whoever committed the crimes involved, and (2) the objects had not left the premises for several years prior to the day in question?

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

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No. 20,092

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No. 20,093

ERNEST S. BORUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The appellants were tried by a jury in the United States District Court for the District of Columbia, Judge

Matthews presiding, on a three-count indictment charging them with housebreaking, robbery, and grand larceny. They were convicted of housebreaking and robbery, and acquitted of grand larceny. On February 18, 1966, appellant Stevenson was sentenced to imprisonment for a term of from two to six years, and appellant Borum was sentenced to imprisonment for a term of from twenty months to five years. These consolidated appeals followed.

At trial, the Government called Roy R. Davis, of 2714 O Street, S.E., who testified that on July 2, 1965, he was called at work at approximately 10 a.m. and informed that his home had been robbed (Tr. 16-17). Returning home, he found that it had been forcibly entered and was in disarray (Tr. 17-18). Many items of value had been stolen (Tr. 18-21). Money had been removed from a metal box which had not left Mr. Davis' home for five years (Tr. 22). Other money had been removed from underneath a glass cover atop a bed table, which glass had not left Mr. Davis' home for about twelve years (Tr. 21). A tea canister had been emptied of its contents of candy. It had been given as a gift to Mr. Davis' mother-in-law, Mrs. Effie Thomas, approximately three years earlier. Mr. Davis testified that the canister had never left his home during those three years. (Tr. 23.) He further testified that he knew neither defendant, and had never given either one of them permission to enter his home (Tr. 25).

Mrs. Effie Thomas, mother-in-law of Mr. Davis, then testified that she lived in Mr. Davis' home, that the home was forcibly entered on July 2, 1965, by two Negro males who ransacked the premises and took $23.25 from her dress pocket (Tr. 73-78). Mrs. Thomas testified that she has cataracts and has great difficulty seeing (Tr. 75). She confirmed Mr. Davis' testimony that the tea canister had been a gift about three years earlier, and that she kept candy in it (Tr. 80).

Linda Mathis, Mr. Davis' 13-year-old neighbor, testified that, on the morning in question, she saw two shabbily-

dressed Negro males knock on the screen door of the Davis home and pull it a little, and then disappear around the side of the Davis home (Tr. 84). She was unable positively to identify either defendant (Tr. 85-86).

James F. Nenno, of the Metropolitan Police Department Identification Bureau, was then qualified as a fingerprint expert (Tr. 89-92). He testified that he was called to the Davis home at about 10:30 a.m. on July 2, 1965, where he lifted several fingerprints from various objects. Some of these prints he was "not able to identify." (Tr. 94.) Of the four prints that he could identify, three were identical to known fingerprints of appellant Borum (Tr. 140). Two of these three had been lifted from the metal box, and the third from the bed table glass (Tr. 141). The fourth identifiable fingerprint was identical to a known fingerprint of appellant Stevenson (Tr. 99, 132). It had been lifted from the tea canister (Tr. 99).

At trial, appellant Borum objected to the admission into evidence of the fingerprints taken from him by the police, as a routine arrest procedure, upon his arrest on July 6, 1965, arguing that these fingerprints were the fruit of an illegal arrest. The arrest resulted [1] from a comparison of fingerprints found at the scene of a crime not here relevant with fingerprints of appellant Borum on file with the Metropoltian Police Department, taken after his arrest on January 22, 1960. This latter arrest led to a conviction for assault with intent to commit robbery. Crim. No. 111-60. Appellant Borum was sentenced under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005 *et seq.*, on April 1, 1960. This conviction was later "set aside" under 18 U.S.C. § 5021(a), upon his unconditional discharge on March 19, 1964. Appellant Borum argued that the fingerprints in police files should have

[1] There is some indication that this arrest resulted at least in part from a photo identification of appellant Borum by the complaining witness. But the arrest warrant apparently mentions only the fingerprints as the basis for probable cause (Tr. 136-137, 294-297, 320.)

been expunged when this conviction was set aside. These fingerprints had not been expunged, and led to the arrest of July 6, 1965, which he claimed was therefore an illegal arrest. His objections to admission of the fingerprint evidence were overruled. (Tr. 113-117, 126-132, 136-137, 165.)

The motions of both defendants for judgment of acquittal at the close of the Government's case were denied (Tr. 169-171).

Testimony of defense witnesses was all directed toward establishing the defense of alibi as to both defendants (Tr. 172-280). The Government's rebuttal witness testified to facts tending to impeach the credibility of one of the defense witnesses (Tr. 283-288).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1801, provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person

convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 18, United States Code, Section 5021(a), provides:

> Upon the unconditional discharge by the division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the division shall issue to the youth offender a certificate to that effect.

SUMMARY OF ARGUMENT

I

Admittedly, the purpose of 18 U.S.C. § 5021(a) is to free the rehabilitated youth offender from the stigma, disadvantages, and taint of a criminal record. However, fingerprints taken in the course of normal police procedure do not fall within the ambit of that purpose. Indeed, strong public policy considerations argue affirmatively for the retention of fingerprint records for possible future use in the public interest.

II

A motion for a judgment of acquittal at the close of the Government's case can be granted only if reasonable minds *must* have a reasonable doubt of the defendant's guilt. That is, such a motion can be granted only if reasonable minds *must* find that the Government's evidence is consistent with a *reasonable* hypothesis other than guilt. The hypotheses to which appellants cling are patently unreasonable. In any event, it surely cannot be said that reasonable minds *must* find that these hypotheses are reasonable.

ARGUMENT

I. As to appellant Borum:

18 U.S.C. § 5021(a), in providing for the setting aside under certain conditions of a "conviction" of a youth offender, does not require that the youth offender's fingerprints be expunged from police files.

18 U.S.C. § 5021(a), a provision of the Federal Youth Corrections Act, provides in pertinent part as follows:

> Upon the unconditional discharge . . . of a committed youth offender before the expiration of the maximum sentence imposed upon him, the *conviction* shall be automatically set aside . . . . (Emphasis added)

Under the terms of the Act, youth offenders are afforded a correctional treatment differing in substantial manner from that afforded all others convicted of federal crimes. 18 U.S.C. § 5005 *et seq.* Unlike other federal prisoners the youth offender can, by evidencing his rehabilitation, have his "conviction . . . set aside". 18 U.S.C. § 5021(a). In *Tatum* v. *United States*, 114 U.S. App. D.C. 49, 51, 310 F.2d 854, 856 (1962), this Court said:

> . . . a person sentenced under the Youth Corrections Act can, by virtue of his own good conduct, be spared the *lifelong burden of a criminal record.* (Emphasis added)

18 U.S.C. § 5021(a), then, in setting aside the youth offender's "conviction", operates to expunge his criminal record. But, contrary to appellant Borum's contention, the public policy behind this statute does not apply to the fingerprints taken from the youth offender upon the original arrest. This Court in *Tatum* referred to the "lifelong burden" of a criminal record. The burdens attached to one with a criminal record are well known. He loses civil and political rights, he has great difficulty obtaining desirable employment, and he is subject to the additional penalties accorded second offenders if he is convicted of crime again. In keeping with the rehabilitative empha-

sis of the Youth Corrections Act, Congress has decided to enable the youth offender to avoid these burdens by evidencing his rehabilation. The psychology involved is clear: the young offender, not yet hardened to criminality, is encouraged to reform by the chance to "wipe the slate clean".[2]

But does all of this apply to the fingerprints retained in police files? Appellee submits that it does not. Whether or not the conviction is set aside, fingerprints can be used only for the purposes of identification. They can be used to identify their maker in cases of accident, amnesia, or death. There is a general trend today toward having such identification information available with respect to every person in the country. All federal employees are fingerprinted, as are many state employees and applicants for government positions. Some states now require that all babies born be fingerprinted or footprinted. Applicants for certain licenses must be fingerprinted. Retention of fingerprints in police files for identification purposes serves a useful purpose and does not impose a "lifelong burden."

Appellant Borum may argue that he has suffered substantial harm from retention of these records because the arrest that led to his conviction in the case at bar might never have been effected had the police expunged his fingerprints from their records. But that harm in no way frustrates the purpose of the Youth Corrections Act, to protect the reformed youth in the normal activities of life. Congress could not have intended that society be deprived of the benefits afforded by retention of fingerprint records because that retention might result in a later arrest of a legitimate criminal suspect through the matching of fingerprints.

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[2] Appellant Borum argues in his brief (p. 14) that use of police fingerprint files to support a subsequent arrest warrant is contrary to the notion of wiping the slate clean. The Government submits that the argument is completely circular—the very question at issue concerns the scope of "the slate."

The retention by police of appellant Borum's fingerprints was proper. His arrest on July 6, 1965, which led subsequently to the conviction now being reviewed was, therefore, a legal arrest. His fingerprints taken by the police on July 6, 1965, were legally obtained and properly admitted in evidence over his objection.

II. As to both appellants:

Appellants' motions for judgment of acquittal at the close of the Government's case were properly denied where the Government's evidence showed that (1) fingerprints of both appellants were found on objects which had been handled by whoever committed the crimes involved, and (2) the objects had not left the premises for several years prior to the day in question.

A motion for judgment of acquittal at the close of the Government's case is properly granted only in very limited circumstances. In *Curley* v. *United States*, 81 U.S. App.D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947), this Court said:

> If the evidence is such that reasonable jurymen *must necessarily* have [a reasonable] doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind *might* fairly have a reasonable doubt or might not have one, the case is for the jury, and the decision is for the jurors to make. (Emphasis added.)

It is of utmost importance that this rule be carefully and strictly applied: a judgment of acquittal can be granted by the court only when, on the basis of all of the evidence introduced by the Government, a reasonable mind *must* have a reasonable doubt. Any less rigorous standard would invade the province of the jury as finder of the facts.

Appellants argue that there are possible hypotheses consistent with the fingerprint testimony other than the hypothesis of the appellants' guilt. But this Court in

Curley made it plain that the mere existence of other possible hypotheses is not enough to remove the case from the jury:

> If the judge were to direct acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury. Under such rule, the judge would have to be convinced of guilt beyond peradventure of doubt before the jury would be permitted to consider the case. That is not the place of the jury in criminal procedure. They are the judges of the facts and of guilt or innocence, not merely a device for checking upon the conclusions of the judge. *Supra* at 393, 160 F.2d at 233.

Given the proper standard, how does it apply to the case at bar? The only evidence introduced by the Government which clearly placed the appellants at the scene of the crime was expert testimony that three fingerprints found on two objects handled by whoever committed the crimes involved were identical to known fingerprints of appellant Borum (Tr. 140-141), and that one fingerprint found on a third such object was identical to a known fingerprint of appellant Stevenson (Tr. 99, 132). The question, therefore, is whether this evidence alone is enough, under the *Curley* standard, to present for jury determination the question whether or not the appellants were in fact the two men who committed the criminal invasion of Mr. Davis' home and the subsequent criminal acts.

Appellant Borum devotes most of his argument on this issue to the fact that the Government did not adduce evidence in addition to the fingerprints which would tie Borum to the crime (eyewitness identification, possession of the stolen goods, etc.) Brief for appellant Borum at 19-26.[3] Yet the law is clear that:

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[3] Appellant Borum argues also that "out of sixteen legible prints taken at the Davis' home [the fingerprint expert] could only identify the persons who left four of them" (Brief for appellant Borum at 22), and then cites 28 A.L.R. 2d 1155-1156 (1953) for the propo-

> Proof that finger, palm, or bare footprints found in the place where a crime was committed, under such circumstances that they could only have been impressed at the time the crime was committed, correspond to those of the accused, may be sufficient proof of identity to sustain a conviction. 28 A.L.R. 2d 1115, 1150, and cases collected, 1150-1155.

Thus, if the facts and circumstances of the case are such that a defendant's fingerprints "could only have been impressed at the time the crime was committed", fingerprint evidence alone may be sufficient to dispel all reasonable doubt of guilt and thus sufficient to sustain a conviction. The exclusion of all other hypotheses as to how and when the fingerprints were impressed need not be to a scientific certainty, but only beyond a reasonable doubt,

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sition that in such a situation proof that some of the fingerprints are those of a defendant is insufficient to sustain a conviction. Brief for appellant Borum at 22. Two things must be noted: first, that the only two cases collected at 28 A.L.R. 2d 1155-1156 (1953) in support of the proposition on which appellant Borum here relies are clearly distinguishable from the case at bar, in that the fingerprints in both of those two cases were found on a surface accessible to the general public; and, second, that appellant Borum is misstating the evidence in the case at bar. The testimony to which he has reference is as follows:

> Q. Some of those prints you were not able to identify, is that correct?
> A. Yes, sir.
> Q. And some you were?
> A. Yes, sir.
> Q. How may were you able to identify?
> A. Four. (Tr. 94.)

The more reasonable reading of the ambiguous exchange quoted above is that only four of the sixteen fingerprints were legible, not that only four of sixteen legible fingerprints were matched to known persons. As the brief for appellant Borum notes: "It would have been simple enough to fingerprint Davis and his family and determine whether any or all of the twelve . . . prints belonged to them, but the Government introduced no such evidence." Brief for appellant Borum at 22. It is difficult to conceive that this most elementary step in the investigation of crime would not have been thought of by either the Metropolitan Police Department or the prosecutor.

Curley v. *United States, supra.*[4] The only hypothesis appellant Borum advances is that his fingerprints could have been impressed upon the objects in Mr. Davis' home at sometime in the vaguely distant past (presumably upon some other unauthorized entry, since the two objects on which his fingerprints were found had not left Mr. Davis' home for five and twelve years, respectively). Appellant Stevenson relies on much the same argument, but adds the fact that the witness in physical possession of the object on which Stevenson's fingerprint was found was not asked by the Government at trial whether or not the object had ever left the premises during the three years she had owned it. Brief for appellant Stevenson at 9-17. But Mr. Davis, who may be said to be in actual possession of anything of which his 81 year old, nearly blind mother-in-law living in his home has physical possession, testified specifically that the object had never left his home (Tr. 23). He is, if anything, in a better posi-

[4] It is important to note that several cases cited by the appellants turned on the existence of *reasonable* hypotheses, other than guilt, which could explain the Government's fingerprint evidence. In *Cooper* v. *United States*, 94 U.S.App.D.C. 343, 218 F.2d 39 (1954), Cooper was buying and often drove the car in which his fingerprint was found. In *Campbell* v. *United States*, 115 U.S.App.D.C. 30, 316 F.2d 681 (1963), the salient facts were the same as in *Cooper*, except that Campbell was not buying the car but was merely a good friend of the owner. In *Cephus* v. *United States*, 117 U.S.App.D.C. 15, 324 F.2d 893 (1963), the defendant was an acquaintance of the man who was arrested driving a stolen auto, on the outside of a window of which was found Cephus' fingerprint. In *Hiet* v. *United States*, D.C.Cir. No. 19716, decided June 22, 1966, which is much relied upon by both appellants, the automobile on a window of which the defendant's fingerprint had been found had been parked on the street for several days and nights, allowing Hiet ample opportunity to impress his fingerprint at sometime other than during the crucial thirty-minute period. In reversing, this Court cited *Cooper*, *Campbell* and *Cephus*. It is worth noting that this Court in *Hiet* split one to one on the fingerprint issue, Chief Judge Bazelon concurring in reversal without reaching that issue. And it is important to note that all four of the above cases concerned automobiles, which by their very nature are far more available for the innocent impression of a fingerprint than are the three objects in Mr. Davis' home on which were found fingerprints of the appellants in the case now before this Court.

tion than is his mother-in-law to speak with assurance on this matter, and his positive statement was never contradicted. Appellant Stevenson inferentially advances the hypotheses that Mrs. Thomas might at some time have made her way, without the knowledge of her son-in-law, to a tea canister repair shop, or may have loaned the canister, worth perhaps five cents, to a friend.

A reasonable mind would have to agree that such hypotheses are within the realms of possibility. But under the *Curley* standard, the case must be withdrawn from the jury only if the existence of such hypotheses *must* raise a reasonable doubt of appellants' guilt in the mind of a reasonable man. As to this question, light is shed by the case of *Stoppelli* v. *United States*, 183 F.2d 391 (9th Cir.), *cert. denied*, 340 U.S. 864 (1950). In *Stoppelli*, the defendant's fingerprint had been found on one of twelve envelopes of powdered heroin. There was expert testimony that the fingerprint had been placed on the envelope at a time when it contained a powdery substance. The defendant argued that this evidence alone was not enough to present the case to the jury. The Court of Appeals affirmed the conviction, stating that the evidence could be held insufficient to sustain the verdict only if the court were able to conclude that

> reasonable minds, as triers of the fact, *must* be in agreement that *reasonable* hypotheses other than guilt could be drawn from the evidence. *Curley* v. *U.S.* . . . (Emphasis added) . . .
>
> In this case, a reasonable jury mind might well have inquired: What was [the defendant] doing with *this particular* envelope anyhow? No doubt, flights of fancy, to infer innocent possession, could be indulged in. [The defendant] might have had powdered sugar in the envelope to feet his pet canary.
>
> . . . A reasonable mind would have to discard its common sense to indulge in such capricious vagaries. It is such speculation and caprice that juries are instruced to avoid in resolving the question of *reasonable doubt.* (Emphasis by the Court) *Stoppelli* v. *United States*, *supra* at 393-94.

This reasoning is directly applicable to the case at bar. By means of a "flight of fancy", it can be hypothesized that appellant Borum committed some hitherto undiscovered unauthorized entry to Mr. Davis' home prior to July 2, 1965, handled the two objects on which his fingerprints were later found, and escaped undetected (presumably because he stole nothing at the time, although each of the two objects in question either contained or covered sums of money). Appellant Stevenson asks this Court to hypothesize that he might have been with his brother-in-law Borum at the time, or that perhaps he somehow managed to handle the tea canister while it was in a repair shop or on loan at the home of a friend of Mrs. Thomas'.

The hypotheses to which appellants cling are patently unreasonable. In any event, it surely cannot be said that reasonable minds *must* find that such hypotheses are reasonable, as would be required by the logic of *Stoppelli* before a judgment of acquittal at the close of the Government's case would be proper.

Thus, *Curley* requires that the question go to the jury unless a reasonable doubt *must* exist. And *Stoppelli* concludes that a reasonable doubt must exist only where a reasonable mind *must* find that a *reasonable* hypothesis other than guilt is consistent with the evidence. Stating this another way, the question must go to the jury if a reasonable mind *could* find that the evidence excludes every reasonable hypothesis other than guilt. *Remmer* v. *United States*, 205 F.2d 277, 287-88 (9th Cir. 1953), *rev'd on other grounds*, 347 U.S. 227 (1954). Accordingly, under the facts in the case at bar, appellants' motions for judgments of acquittal at the close of the Government's case were properly denied.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAURICE C. STEVENSON)

Appellant)

v.) Appeal No. 20, 092

UNITED STATES OF AMERICA)

Appellee)

PETITION FOR REHEARING EN BANC

Comes now the appellant, Maurice C. Stevenson, through his court-appointed attorney, and respectfully prays that this Court grant a rehearing en banc of his appeal. As grounds therefor, appellant represents to the Court as follows:

1. That on the 19th day of May, 1967, a panel of this Court affirmed appellant's housebreaking and robbery convictions, which resulted solely from fingerprint evidence.

2. As stated in the aforementioned opinion of this Court, the trial court instructed the jury that before a verdict of guilty could be returned, the jury must be satisfied beyond a reasonable doubt that the housebreaking and robbery had occurred on or about July 2, 1965, as had been testified, and that Stevenson was one of those who had perpetrated the crimes. However, the trial court also gave to the jury the following instruction, not mentioned in the opinion:

> You are told that the government has the burden of proving beyond a reasonable doubt that the latent fingerprints relied on by the government were left by the defendants on the object or objects referred to in the expert's testimony, on or about July 2, 1965, at the time of the alleged housebreaking (Tr. 418-419).

The Government's fingerprint expert admitted that he did not know when Stevenson's print was placed on the container (Tr. 162) and conceded that, under ideal conditions, such a print may last for two years (Tr. 168-169).

3. In Borum v. United States, Appeal No. 19,960, decided the same day as the instant appeal, this Court, in reversing a conviction based solely on fingerprint evidence, made the following comments:

> The Government's evidence shows that Borum touched the one or two jars in question. But there is no evidence, either direct or circumstantial, which indicates that he touched the jars in the course of a housebreaking on June 2, 1965 (Slip Op., p. 3)
>
> The case should not have been submitted to the jury, for the Government produced no evidence, either direct or circumstantial, which could support an inference that the fingerprints were placed on the jars during commission of the crim (Slip Op., p. 5)

The instant case is legally indistinguishable from Borum, supra. Implicit in the majority opinion, and expressly stated in the concurring opinion, is the factual distinction that the container involved in the instant case was located inside the house when touched by the defendant. But the question to be resolved by the jury under the aforementioned instruction of the trial court, was not where was the article located when touched, but "when was it touched". Regardless of the accessibility or non-accessibility of the object to the defendant, the trial court instructed the jury that they must be satisfied beyond a reasonable

doubt that it was touched on July 2, 1965, the majority in Borum, supra, concurred in that requirement, as did Senior Circuit Judge Prettyman in Hiet v. United States, 124 U. S. App. D. C. 313, 365 F. 2d 504 (1966). Yet, as indicated by the writer of the majority opinion in Borum, supra, it was deemed permissible for the jury in the instant case to conclude that the defendant probably touched the container on July 2, 1965. Appellant submits that such a standard should be reserved for civil cases, wherein a person's liberty is not at stake.

The holding of this Court in the instant case could be reconciled with Borum and Hiet, supra, only if the deciding panel viewed the evidence herein in the same mistaken fashion as did the concurring judge in Borum, supra, wherein he stated:

> Unlike this case, in Borum No. 20, 093 the evidence shows that Borum's fingerprints could have been left only at the time of the crime (Slip Op. p. 7).

Actually, in Borum No. 20, 093, as in the case of appellant Stevenson, the evidence showed that the fingerprints could have been placed on the objects at anytime up to two years preceding the date of the crime. As appellant Stevenson indicated in his brief (footnote 1, page 12), the assertion that the prints could have been placed on the objects only at the time of the crime, was made not by a sworn witness, but by government counsel during closing argument to the jury.

4. Finally, even assuming the validity of the "accessibility" criteria, the deciding panel may have indulged in legal fiction to sustain its application to the facts pertaining to appellant Stevenson. Although the owner of the house testified that the container had never left the premises during the three years that it had been owned by his mother-in-law (Tr. 22-23), he was unable to answer

other questions concerning the container becuase, he asserted, it was kept in his mother-in-law's room (Tr. 55-56). Thus, it is obvious that his statement that the container had not left the premises was not based on personal knowledge. If, however, the panel felt that the owner of the premises was presumed to know whether or not a small container had ever been removed therefrom by the occupant who owned said container, then this is an even more unrealistic presumption than the "presumption of possession" denounced by Mr. Justice Frankfurter, dissenting in Harris v. United States, 331 U. S. 145, 164 (1947). Moreover, as pointed out by the concurring judge in Borum, supra, the finger-prints in Hiet were found on the inside of a vent window of a car whose lock had been broken off - a location, appellant submits no less inaccessible than that involved in the instant case.

WHEREFORE, the premises considered, appellant prays that the Court grant a rehearing en banc in the above-captioned cause.

Respectfully submitted,

Shellie F. Bowers

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535 F Street, N. W.
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(Appointed by this Court)

CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing Petition for Rehearing En Banc is presented in good faith and not for delay.

Shellie F. Bowers
Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing En Banc was personally served upon the United States Attorney, United States Courthouse, Washington, D. C. this 5th day of June, 1967.

Shellie F. Bowers